Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH W. PETERS, M.D.,
Petitioner,

v.

POLK COUNTY, TEXAS, d/b/a POLK COUNTY MEMORIAL HOSPITAL,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

1. Whether the Fifth Circuit can, in clear contradiction of the Supreme Court's ruling in *Farrar v. Hobby*, 506 U.S. _____, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), affirm *per curiam* the trial court's order that the plaintiff who prevailed on all four of his civil rights claims under 42 U.S.C. §1983 but obtained only nominal damages therefor cannot, as a matter of law, qualify as a "prevailing party" for attorney's fees under 42 U.S.C. §1988?

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KENNETH W. PETERS, M.D.,
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POLK COUNTY, TEXAS, d/b/a POLK COUNTY MEMORIAL HOSPITAL,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Kenneth W. Peters respectfully prays that a writ of certiorari issue to review the judgment of the United States court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On July 30, 1992, the United States District Court for the Eastern District of Texas (Lufkin Division) entered its Order (Appendix A at page 1a) and Amended Final Judgment (Appendix B at page 4a) affirming the jury's verdict in favor of Petitioner on four civil rights counts under 42 U.S.C. §1983, awarding Petitioner nominal damages therefor, and, *inter alia*, denying Petitioner's motion for attorney's fees under 42 U.S.C. §1988.

On October 7, 1993, the United States Court of Appeals for the Fifth Circuit affirmed *per curiam* the judgment of the District Court. Appendix C at page 5a.

On November 2, 1993, the Fifth Circuit Court of Appeals entered its order denying Petitioner's Petition for Rehearing. Appendix D at page 6a.

JURISDICTION

The trial court's Order and Amended Final Judgment were entered on July 30, 1992. The Fifth Circuit affirmed *per curiam* the judgment of the trial court on October 7, 1993. The Fifth Circuit denied Petitioner's Petition for Rehearing on November 2, 1993. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

42 U.S.C. §1988:

§1988. **Proceedings in vindication of civil rights; attorney's fees**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §11133(a)(1):

REPORTING OF CERTAIN PROFESSIONAL REVIEW ACTIONS TAKEN BY HEALTH CARE ENTITIES.

(a) REPORTING BY HEALTH CARE ENTITIES.--

(1) ON PHYSICIANS. -- Each health care entity which --

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days... shall report to the Board of Medical Examiners, in accordance with section 424(a) [42 U.S.C. §11134(a)], the information described in paragraph (3)....

(3) INFORMATION TO BE REPORTED.__ The information to be reported under this subsection is--

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate....

42 U.S.C. §11136:

DISCLOSURE AND CORRECTION OF INFORMATION.

With respect to the information reported to the Secretary (or the agency designated under section 424(b)) under this part respecting a physician or other licensed health care practitioner, the Secretary

shall, by regulation, provide for....

(2) procedures in the case of disputed accuracy of the information.

TEX. REV. CIV. STAT. ANN., art. 4495b, §5.06(a)&(b):

Sec. 5.06. (a) The provisions of the Health Care Quality Improvement Act of 1986 (Public Law No. 99-660) apply to a professional review action taken by a professional review body in this state on or after the effective date of this Act [September 1, 1987].

(b) Each medical peer review committee or health-care entity shall report in writing to the board [Texas Board of Medical Examiners] the results and circumstances of any professional review action that adversely affects the clinical privileges of a physician while the physician is under an investigation by the medical peer review committee relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding, or in the case of an entity which is a professional society or association, takes a professional review action which adversely affects the membership of a physician in the society or association. The duty to report under this section shall not be nullified through contract.

REGULATIONS INVOLVED

45 C.F.R. §60.6:

Reporting errors, omissions, and revisions.

(a) Persons and entities are responsible for the accuracy of information which they report to the Data Bank. If errors or omissions are found after information has been reported, the person or entity which reported it must send an addition or correction to the Data Bank or, in the case of reports made under §60.9, to the Board of Medical Examiners, as soon as possible.

(b) An individual or entity which reports information on licensure or clinical privileges under §§60.8 or 60.9 must also report any revision of the action originally reported. Revisions include reversal of a professional review action or reinstatement of a license. Revisions are subject to the same time constraints and procedures of §§60.5, 60.8, and 60.9, as applicable to the original action which was reported.

STATEMENT OF THE CASE

The Fifth Circuit's opinion in this case clearly rejects the Supreme Court's ruling in *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494, 1992 WL 362775 (December 14, 1992). At the District Court the jury found that the actions of Respondent Polk County both in terminating Petitioner Dr. Peters's medical staff privileges at the hospital and in denying him privileges at the hospital violated both his substantive and procedural due process civil rights under 42 U.S.C. §1983 (four counts total). The jury, however, awarded Petitioner no money damages. After the jury's verdict but before final judgment, the hospital refused Petitioner's request that it correct its tainted peer review actions. Petitioner sought 1) a declaratory ruling from the court that the hospital's actions were unlawful and null and void and 2) an injunction forcing the hospital to restore his privileges, to expunge its records of the flawed peer review action, and to correct the record for the benefit of third parties. Petitioner also sought attorney's fees under 42 U.S.C. §1988.

The court affirmed the jury verdict but denied Petitioner's request for injunctive relief on the ground that his injuries were conjectural rather than real and immediate. The court also denied Petitioner's request for attorney's fees, finding that Petitioner was not a "prevailing party" under *Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991), because he had been awarded only nominal money damages. It is this latter issue of attorney's fees that prompts this Petition for Writ of Certiorari.

When the trial court decided this case on July 30, 1992, it relied on the Fifth Circuit's opinion in *Estate of*

Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), *cert. granted, sub. nom., Farrar v. Hobby*, 112 S.Ct. 1159 (1992). In that case the Fifth Circuit held that a plaintiff who obtains only nominal damages for a constitutional deprivation *cannot* as a matter of law be considered a prevailing party for attorney's fees under 42 U.S.C. §1988. On the strength of that authority, the trial court ruled that Petitioner was not a "prevailing party" (Appendix A, page 1a), and the trial court declined to hear any evidence on what attorney's fees, if any, would be reasonable.

After the district court's decision in July, 1992, the Supreme Court in December, 1992, specifically rejected the Fifth Circuit's holding in *Farrar* on the "prevailing party" issue, ruling that a civil rights plaintiff who receives a nominal damages award *is* a "prevailing party" eligible to receive attorney's fees under 42 U.S.C. §1988 and ruling further that the Fifth Circuit had erred in holding that the nominal damages award to petitioners in that case failed to render them prevailing parties, that the "prevailing party" inquiry does not turn on the magnitude of the relief obtained, and that the amount of damages received by the plaintiff simply goes to the reasonableness of a fee award. *Farrar v. Hobby*, 113 S.Ct. at 570, 573 and 574.

Because the trial court had relied on the Fifth Circuit's *Farrar* decision in determining that Petitioner was not entitled as a matter of law to any attorneys' fees, the trial court had sought no evidence and conducted no inquiry on the issue of reasonable attorneys' fees. On the strength of the Supreme Court's opinion in *Farrar*, Petitioner appealed to the Fifth Circuit to remand the question of attorneys' fees back to the trial court for a determination of what fees, if any,

would be reasonable. Petitioner cited the Supreme Court's *Farrar* decision to the Fifth Circuit in his original brief, in his reply brief, during oral argument, and also in his Petition for Rehearing, yet the Fifth Circuit clearly rejected the Supreme Court's rule by simply affirming *per curiam* the trial court's decision (Appendix C at page 5a) and summarily denying the Petition for Rehearing (Appendix D at page 6a). Thus, either the Fifth Circuit has flouted the Supreme Court or the Fifth Circuit simply did not focus on Petitioner's appeal closely enough to notice the clear legal error caused by its *per curiam* affirmance of the trial court's decision. The questions asked of the parties by the three judge panel during oral argument certainly suggested that the panelists had not read the briefs prior to oral argument, and the fact that the Fifth Circuit's *per curiam* opinion was entered the day of oral argument suggests that neither the judges nor any of their staff had time to read the briefs or review applicable law after oral argument. Because the Fifth Circuit's *per curiam* opinion will have no precedential impact, its action in this case will not create a conflict between published opinions requiring further resolution by the Supreme Court. (Indeed, the Supreme Court has already resolved the issue presented in this case when it decided *Farrar* in December of 1992.) But Petitioner in this case has relied on the Supreme Court's holding in bringing his appeal, and now Petitioner has clearly been deprived of justice by the Fifth Circuit's easy rejection of the Supreme Court's dispositive instruction on this issue. Either the Fifth Circuit has rejected the Supreme Court's authority or the Fifth Circuit has been so indifferent and blase in its consideration of Petitioner's appeal that the judges simply missed the legal import of their affirmation of the trial court's decision. In either event, the three-judge panel has so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Subject matter jurisdiction at the district court was based on federal question. Petitioner's complaint in district court included a civil rights cause of action under 42 U.S.C. §1983 and other federal and ancillary state causes of action. Petitioner's appeal to the Fifth Circuit was an appeal of a final order of a U.S. Magistrate after the parties consented to trial before a Magistrate pursuant to 28 U.S.C. §636(c)(1). The Circuit Court had jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291 and 28 U.S.C. §636(c)(3).

REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE

The Fifth Circuit's opinion in this case clearly contradicts the Supreme Court's holding in *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566, 121 L.Ed.2d 494, 1992 WL 362775 (1992). As indicated above, after the district court had entered its final judgement in Petitioner's case, the Supreme Court specifically rejected the Fifth Circuit's holding in *Farrar* on the "prevailing party" issue:

> We decide today whether a civil rights plaintiff who receives a nominal damages award is a "prevailing party" eligible to receive attorney's fees under 42 U.S.C. §1988.

Farrar v. Hobby, 113 S.Ct. at 570.

> We ... hold that a plaintiff who wins nominal damages *is* a prevailing party under §1988.

113 S.Ct. at 573 (emphasis added).

> [T]he Court of Appeals for the Fifth Circuit erred in holding that petitioners' nominal damages award failed to render them prevailing parties.... [T]he prevailing party inquiry does not turn on the magnitude of the relief obtained.... "[T]he *degree* of the plaintiff's success" does not affect "eligibility for a fee award" [quoting from *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 109 S.Ct. 1486 (1989)].

113 S. Ct. at 574. The Supreme Court went on to say that the amount of damages received "goes to the

reasonableness of a fee award" (quoting from *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983).

It is well-settled that when the controlling law has changed between the entering of a decision below and the consideration of the matter on appeal the case should be decided in light of the law existing at of the time of the appellate decision. *Bradley v. School Board of City of Richmond et al.*, 416 U.S. 696, 94 S.Ct. 2006 (1974); *Carroll v. General Acc. Inc. Co. of America*, 891 F.2d 1174 (5th Cir. 1990). This rule is especially true when the change in the law is not some new intervening statute that might present a question of whether it was intended to apply retroactively but is simply a judicial construction of the proper application of a statute that itself has remained unchanged.

Accordingly, the proper inquiry for the Fifth Circuit in this case was not whether the trial court erred under the law applicable at the time of its decision or whether the trial court abused its discretion or was arbitrary or capricious. Rather, the proper inquiry the Fifth Circuit would have been the *de novo* determination whether the district court's conclusion that Petitioner was not a "prevailing party" (regardless of the appropriateness of that holding at the time it was made) could stand under new Supreme Court authority issued since the trial court made its determination. Clearly it could not.

Petitioner Dr. Peters had had no opportunity to offer evidence or make his case for what attorneys' fees, if any, would have been reasonable in the case at bar. While the Supreme Court proceeded in *Farrar* to determine that no attorney's fees were reasonable in *Farrar* based on the facts of that case, it is important to note that the Supreme Court had before it the full

record of the evidentiary proceedings below on the issue of reasonableness of attorney's fees. There has been no hearing in Petitioner's case on that issue because the trial court ruled that Petitioner was not a prevailing party -- a ruling no longer sustainable under the Supreme Court's decision in *Farrar*.

Further, the facts of this case differ materially from those in *Farrar*. Through this lawsuit, Petitioner sought not only to redeem his professional reputation but also to recover money damages. It is undisputed that as a result of Respondent Polk County's unlawful actions Petitioner was kicked off the medical staff at the hospital and that Petitioner was forced to relocate his medical practice to another town (Respondent Memorial Hospital being the only hospital in Livingston, Texas). Petitioner's resulting damages could have been enormous. Fortunately, Petitioner was able to mitigate his damages. As a credit to his abilities and competence, his medical practice flourished in another town after he was driven out of Livingston, and his income soon surpassed what he had been earning while practicing in Livingston. Petitioner's discharge of his legal obligation to mitigate his damages, however, should not work a detriment against him with respect to reasonable attorney's fees he has already incurred. The facts remain that Respondent turned him out of the hospital, drove him out of town, and filed a report of adverse action against him with the Texas Board of Medical Examiners -- all based on proceedings which have been judicially determined to have been unlawful. The jury verdict and judgment finding Respondent's actions unlawful constitute more than just a nominal or technical victory, as was obtained in *Farrar*. The jury found Respondent's actions to be both unfair and unreasonable.

As such, Respondent's adverse actions against Petitioner, rather than remaining valid, are now flawed and subject to correction not only appropriate but *required* by law. After it unlawfully drove him out of the hospital, Respondent issued a formal report of adverse peer review action to the Texas Board of Medical Examiners pursuant to the reporting requirements of the federal Health Care Quality Improvement Act of 1986 (42 U.S.C. §11133(a)(1)) and the Texas Medical Practice Act (TEX. REV. CIV. STAT. ANN., art. 4495b, §5.06(a)&(b)). Reports of adverse medical staff privilege actions filed by hospitals with the Texas Board of Medical Examiners must be forwarded by that Board to the National Practitioner Data Bank in Baltimore. 42 U.S.C. §11133(b) and §11134(a); 45 C.F.R. §§60.4, 60.5 & 60.9. Federal law also requires a hospital to file a corrective report if an earlier reported action has been subject to error, omission or revision:

> §60.6 **Reporting errors, omissions, and revisions.**
>
> (a) Persons and entities are responsible for the accuracy of information which they report to the Data Bank. If errors or omissions are found after information has been reported, the person or entity which reported it must send an addition or correction to the Data Bank or, in the case of reports made under §60.9, to the Board of Medical Examiners, as soon as possible.
>
> (b) An individual or entity which reports information on licensure or clinical privileges under §§60.8 or 60.9 must also report any revision of the action originally reported. Revisions include reversal of a professional review action or reinstatement of a license. Revisions are subject to the same time

> constraints and procedures of §§60.5, 60.8, and 60.9, as applicable to the original action which was reported.

45 C.F.R. §60.6. Certainly, Respondent's actions regarding Petitioner's staff privileges were in error, as found by the jury. Yet even after the jury returned its verdict finding that Respondent's actions were unlawful, the hospital still refused to acknowledge any error regarding Petitioner's medical staff status or otherwise to correct the record in any way. Filing a corrective report with the Board of Medical Examiners would have cost Respondent no money or caused it any hardship. Respondent's fervent intransigence on this issue is astonishing and incomprehensible unless perceived in the context of Respondent's desperate desire to avoid any liability for attorneys' fees reasonably incurred by Petitioner in seeking and obtaining his judgment that the hospital's adverse action against him was both unreasonable (substantive due process) and unfair (procedural due process). The tail is wagging the dog here, as far as Respondent is concerned, artificially skewing Respondent's actions in a manner to deprive Petitioner of the relief he has demonstrated he is entitled to after time-consuming and expensive litigation.

Petitioner's victory is hardly technical, as was found by the Supreme Court in *Farrar*. He has through prodigious effort and much sacrifice successfully mitigated his damages, but even that effort does not erase the black mark against him caused by Respondent's ousting him unlawfully from the hospital medical staff. *Farrar* says that a civil rights plaintiff who recovers nominal money damages is entitled to reasonable attorney's fees. The issue to be determined is what fees are reasonable. The judgment below has

changed the legal relationship between Petitioner and Respondent, and Petitioner has clearly obtained at least some relief on the merits of his claim. Following the judgment, Respondent is required to modify its conduct toward Petitioner at the very least by correcting its errors and notifying the Texas Board of Medical Examiners of the errors corrected. 45 C.F.R. §60.6. Respondent simply compounds its errors by continuing to refuse to make amends even after the jury verdict. Now not only is the adverse action judicially determined to have been unlawful, but Respondent's refusal to issue a correcting report or take any other action to modify its position is also unlawful and remains unlawful for so long as Respondent remains intransigent. Respondent should not be allowed to benefit from its continued unlawful and unwarranted conduct by claiming that because it has refused to act lawfully it has avoided a material alteration of its relationship with Petitioner.

Petitioner is entitled at least to be heard on the issue of reasonable attorney's fees. The Supreme Court in *Farrar* noted that the trial court is the proper tribunal for such a determination, but the Supreme Court decided to rule itself on the attorney's fees issue in *Farrar* not only because it already had before it a record of the full evidentiary proceedings of the trial court on the attorney's fee issue, but also because it found "special circumstances" in *Farrar* that permitted the Supreme Court to conclude that reasonable attorneys fees in that case were zero. There are no such "special circumstances" in this case, and Petitioner is entitled to address that issue before the fact finder.

As such, Petitioner respectfully urges that the only appropriate course for the Fifth Circuit to have followed on the attorneys' fee issue would have been to reverse

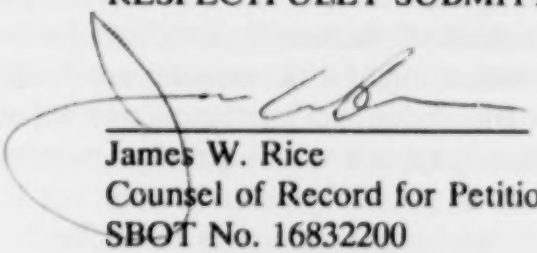
the trial court, because the legal basis for the trial court's original determination has since been clearly rejected by the Supreme Court. The next appropriate determination for the Fifth Circuit would have been to remand the case back to the trial court for a determination of reasonable attorneys fees. That determination might ultimately be substantial or it might be zero, but under the Supreme Court's *Farrar* decision that determination is a fact question properly before the trial court.

Because the Fifth Circuit's *per curiam* opinion will have no precedential impact, its action in this case will not create a conflict between published opinions requiring further resolution by the Supreme Court. (Indeed, the Supreme Court has already resolved the issue presented in this case when it decided *Farrar* in December of 1992.) Nonetheless, the Fifth Circuit has clearly decided a federal question in a way that conflicts with the governing decision of the Supreme Court opinion Petitioner in this case has relied on the Supreme Court's decision and the authority of the Supreme Court in bringing his appeal, and now Petitioner has clearly been deprived of justice by the Fifth Circuit's easy rejection of the Supreme Court's dispositive instruction on this issue. Either the Fifth Circuit has rejected the Supreme Court's authority or the Fifth Circuit has been so indifferent and blase in its consideration of Petitioner's appeal that the judges simply missed the legal import of their affirmation of the trial court's decision. In either event, the three-judge panel has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Petitioner accordingly respectfully requests that this honorable Court issue a writ of certiorari to the United States

Court of Appeals for the Fifth Circuit.

Dated: January 28, 1994.

RESPECTFULLY SUBMITTED,



James W. Rice
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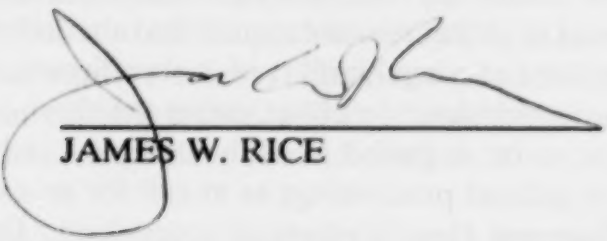
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Petition for Writ of Certiorari has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, this 31st day of January, 1994, to Mr. Don Karotkin, Esq., Funderburk & Funderburk, 2777 Allen Parkway, Suite 1080, Houston, TX 77019, attorney for Respondent Polk County, Texas.



JAMES W. RICE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KENNETH W. PETERS, M.D.	§	
	§	
V.	§	CIVIL ACTION
	§	NO. 9:88CV179
LAKE LIVINGSTON MEDICAL CENTER, ET AL.	§	

ORDER

Four motions are pending before the Court:

(1) Plaintiff's motion for attorney fees (docket #172),
(2) Motion of Defendant's Bill Ingram, M.D., Raymond Neuman, M.D. and Michael Shukan, M.D. to alter or amend judgment (docket #181),
(3) Motion of Defendant Polk County to alter or amend judgment (docket #175), and
(4) Plaintiff's motion for declaratory and injunctive relief (docket #181).

Having carefully considered the motions of the parties, the Court finds that Plaintiff's motion for attorneys' fees should be **DENIED**. In light of *Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991), *cert. granted, sub. nom., Farrar v. Hobby*, 112 S.Ct. 1159(1992), I find that Plaintiff is not a prevailing party.

The Court further finds that the motion of

Defendants Neuman, Ingram and Shukan to alter or amend judgment should be **GRANTED in part** and **DENIED in part**. The motion is **GRANTED** to the extent that the final judgment filed on April 29, 1992, shall be amended to provide that both the individual Defendants and Plaintiff shall each bear their own costs. The motion is **DENIED** as to Defendants' request that the judgment be altered, amended, or modified to award attorneys' fees to the Defendants. In light of *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990). I find the Defendants named above are precluded from an award of attorneys' fees by the Court's finding herewith that the Plaintiff's action was not frivolous, unreasonable, or without foundation.

The Court further finds that the motion of Defendant Polk County to alter or amend judgment should be **DENIED**. Federal Rule of Civil Procedure 54(d).

Furthermore, the Court finds that Plaintiff's motion injunctive and declaratory relief should be **DENIED**. Plaintiff lacks standing for injunctive in that the complained of injuries are conjectural rather than real and immediate. *See Henschen v. City of Houston, Texas*, 959 F.2d 584, (5th Cir. 1992). It is therefore

ORDERED that the motion of Defendants Neuman, Ingram and Shukan to alter or amend final judgment be **GRANTED** in part and amended judgment providing that the individual Defendants and Plaintiff shall bear their own costs shall be entered. This motion is **DENIED** as to Defendants' request for an award of attorneys' fees against Plaintiff. It is further

ORDERED that Defendant Polk County's motion

to alter or amend judgment is **DENIED**. It is further

ORDERED that Defendant Polk County's motion to alter or amend judgment is **DENIED**. Finally, it is

ORDERED that Plaintiff's motion for injunctive and declaratory relief be **DENIED**.

SIGNED this 30th day of July, 1992.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KENNETH W. PETERS, M.D.	§	
	§	
V.	§	CIVIL ACTION
	§	NO. 9:88CV179
LAKE LIVINGSTON MEDICAL CENTER, ET AL.	§	

AMENDED FINAL JUDGMENT

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict, and in accordance with the Court's memorandum opinion and order issued this date,

It is **ORDERED** and **ADJUDGED** that the Plaintiff, Kenneth W. Peters, recover from Defendant Polk County, Texas, the sum of Four Dollars ($4.00) and his cost of action against Polk County. It is, further, **ORDERED** and **ADJUDGED** that Plaintiff take nothing against the remaining Defendants and Plaintiff and the remaining Defendants shall bear their own costs of action.

SIGNED this 30th day of July, 1992.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4886

KENNETH W. PETERS,
Plaintiff-Appellant,

versus

POLK COUNTY MEMORIAL HOSPITAL,
Consolidate Plaintiff-
Defendants-Appellee,

LAKE LIVINGSTON MEDICAL CENTER, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas (9-88-CV-179)

Before JOHNSON, WIENER, AND DeMOSS, Circuit Judges.

PER CURIAM:*

The judgment of the district court is AFFIRMED. See Fifth Circuit Local Rule 47.6.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4886

KENNETH W. PETERS,
Plaintiff-Appellant,

versus

POLK COUNTY MEMORIAL HOSPITAL,
Consolidate Plaintiff-
Defendant-Appellee,

LAKE LIVINGSTON MEDICAL CENTER, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING
(November 2, 1993)

Before JOHNSON, WIENER, AND DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Clerk's Note: See FRAP and Local Rules 41 for the stay of the mandate.

Supreme Court, U.S.
FILED
APR 9 1994

(2)

No. 93-1484

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KENNETH W. PETERS, M.D.,
Petitioner

v.

POLK COUNTY, TEXAS, d/b/a POLK COUNTY MEMORIAL HOSPITAL,
Respondent

Brief Of Respondent, Polk County Memorial Hospital d/b/a/ Polk County Memorial Hospital In Opposition to Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Whether the Petitioner, who prevailed on his civil rights claims under 42 U.S.C. §1983, but obtained a judgment for nominal damages only, may recover attorney's fees under 42 U.S.C. §1988.

LIST OF PARTIES

Kenneth W. Peters, M.D.

Polk County, Texas, d/b/a Polk County Memorial Hospital

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No. 93-1484

IN THE

Supreme Court of the United States

October Term, 1993

KENNETH W. PETERS, M.D.,
Petitioner

v.

POLK COUNTY, TEXAS, d/b/a POLK COUNTY MEMORIAL HOSPITAL,
Respondent

Brief of Respondent, Polk County, Texas, d/b/a Polk County Memorial Hospital In Opposition to Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Polk County, Texas, d/b/a Polk County Memorial Hospital respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

At trial, the jury found that Polk County violated Dr. Peters' procedural and substantive due process rights in the termination of his hospital staff privileges, but found that he had suffered no monetary damages as a result of the violations. The United States Magistrate Judge rendered judgment in favor of Dr. Peters for nominal damages in the amount of four dollars.

After the rendition of judgment, Dr. Peters moved the court, for the first time, to issue an injunction: 1) requiring Polk County to expurgate and expunge its records regarding the termination and denial of staff privileges; 2) requiring Polk County to reinstate Dr. Peters to the medical staff, so that he could immediately resign therefrom; and 3) prohibiting Polk County from reporting to anyone anything other than that Dr. Peters resigned voluntarily (Appendix A). In two other post-judgment motions, Dr. Peters sought an award of attorney's fees of over $300,000.00 (Appendices B and C).

The United States Magistrate Judge denied Dr. Peters' motion for declaratory and injunctive relief and his motions for attorney's fees (Appendix D). The motion for injunctive and declaratory relief was denied on the grounds of lack of standing and that the complained of injuries were conjectural rather than real and immediate (Appendix D, p. 19a). The motions for attorney's fees were denied on the grounds that Dr. Peters was not a prevailing party (Appendix D, p. 18a-19a).

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court, *per curiam*. Dr. Peters' motion for rehearing was denied, *per curiam*.

ARGUMENT

a. *Farrar* controls this case.

Dr. Peters argues, in essence, that the United States Court of Appeals erred because it agreed with the United States Magistrate Judge that Dr. Peters was not a "prevailing party," as that term is used in 42 U.S.C. §1988. The court of appeals, however, did no such thing. It affirmed the *judgment* of the district court, not the basis for it.

As Dr. Peters has correctly observed, when Judge Guthrie rendered judgment, this Court had not yet decided *Farrar v. Hobby*, 506 U.S._____, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). For her holding that Dr. Peters was not a prevailing party, Judge Guthrie relied on *Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991), *aff'd sub nom. Farrar v. Hobby*, 506 U.S. _____, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Because Dr. Peters obtained an award of nominal damages on the basis of findings of civil rights violations, he is a prevailing party under Section 1988. *Farrar v. Hobby*, 113 S.Ct. at 573. However, it does not follow that he is entitled to recover attorney's fees.

While apparently placing great reliance on this Court's opinion in *Farrar*, Dr. Peters conveniently ignores the result of the case. Although this Court disagreed with the court of appeals' holding that Plaintiffs Farrar did not "prevail" for Section 1988 purposes, it affirmed the judgment that plaintiffs take nothing on their claim for attorney's fees.

> In some circumstances, even a plaintiff who formally "prevails" under Section 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. As we have held, a nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his "absolute" right to procedural due process through enforcement of a judgment against the defendant. (citation omitted.) In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. (citation omitted.) Whatever the constitutional basis

> for substantive liability, damages awarded in a Section 1983 action "must always be designed 'to compensate injuries caused by the [constitutional] deprivation.'" (citations omitted.) When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, (citation omitted), the only reasonable fee is usually no fee at all.

113 S.Ct. at 575.

b. "Corrective action" is not required.

In a desperate effort to distinguish *Farrar*, Dr. Peters argues that the verdict and judgment in the district court materially altered the legal relationship between the parties, entitling him to consideration of an award of attorney's fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). In support of this proposition, he argues that Polk County issued a formal report of adverse peer review action to the Texas Board of Medical Examiners, which was required by statute to be forwarded to the National Practitioner Data Bank in Baltimore (Petition for Writ of Certiorari at 14). Dr. Peters offered no evidence that any report was actually made by the Board to the Data Bank. The report itself, if any there was, was not offered into evidence. No secondary evidence of the content of any such report was admitted. Dr. Peters did prove, by circumstantial evidence, that Polk County reported to the Board Dr. Peters' "denial of reappointment" (Appendix E; Pl. Ex. 213; R. 16, p. 20). Apparently asking this Court to assume that this information was reported by the Board to the Data Bank, Dr. Peters goes on to argue that that report is now required to be "corrected," pursuant to the provisions of 45 C.F.R. §60.6 (1994).

That regulation provides, in pertinent part:

> Reporting errors, omissions, and revisions.
>
> (a) Persons and entities are responsible for the accuracy of information which they report to the Data Bank. If errors or omissions are found after information has been reported, the person or entity which reported it must send an addition or correction to the Data Bank or, in the case of reports made under Section 60.9, to the Board of Medical Examiners, as soon as possible. ...

45 C.F.R. §60.6(a) (1994).

Assuming, *arguendo*, that this Court infers that the Board reported to the Data Bank Polk County's "denial of reappointment," it does not follow that the county is now required by Section 60.6 to take any action. It is a fact that the county denied Dr. Peters staff privileges. That fact is just as true today as it was when it was allegedly reported by the Board to the Data Bank. No "errors or omissions" in this information exist. Therefore, there is no "addition or correction" required by Section 60.6(a).

Dr. Peters argues that because the jury found the county's actions "in error," Section 60.6(a) is triggered. First, the jury did not find an "error," but rather due process violations. Second, there is a distinct difference between *erroneous factual information*, which is clearly what Section 60.6(a) refers to, and *action* of a hospital later judicially found to have been constitutionally flawed. Dr. Peters cites no authority supporting his novel and imaginative construction of Section 60.6, nor has the county's research disclosed any.

c. The relationship of the parties has not been materially altered.

Dr. Peters originally sued seven defendants and asserted at least twelve theories of recovery, seeking substantial compensatory and punitive damages. He offered expert testimony by which he sought to persuade the jury that his economic damages alone amounted to over $400,000.00 (Appendix A, p. 8a). As a result, he has obtained a money judgment, on two closely related theories, against one defendant, Polk County, for nominal damages of four dollars. He has obtained no injunctive or declaratory relief, nor has he preserved for review by this Court the denial of such relief. He has not secured readmission to the hospital's medical staff. He has not forced the county to modify its conduct or to notify anyone of anything. He has neither extracted a settlement of any kind from the county, nor forced or induced the county to change any of its practices, rules or policies. He has failed to establish that the county is under a legal duty to do anything, other than to pay him the sum of four dollars. If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-92, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Dr. Peters has not succeeded on any significant issue in this litigation which achieved any of the benefit he sought in bringing suit.

In the complaint on which he proceeded to trial, Dr. Peters made no reference to any equitable relief other than that defendants "be permanently enjoined and restrained from each and every one of the unlawful practices alleged herein

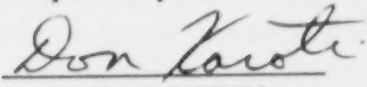
. . . (R. 3, p. 821). He sought no declaratory relief of any kind. After losing at trial and, in fact, after judgment was initially rendered in the district court, Dr. Peters suddenly became very interested in equitable and declaratory relief. The reason is obvious: he knew that an award of nominal damages, standing alone, would not support an award of attorney's fees, pursuant to the provisions of Section 1988. Dr. Peters' post-judgment motions seeking equitable and declaratory relief constituted a pretense motivated solely by the desire to establish an arguable basis for a claim for attorney's fees. Similarly, Dr. Peters' assertion that he wants and is entitled to "corrective action" by the county, which he asserted for the first time on appeal, is a pretense asserted for the sole purpose of forming the basis of an argument that the legal relationship between the parties has been materially altered, thus entitling him to attorney's fees. Both of these claims are bogus and this Court should reject them.

The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. §1988. *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40, 54 (1983). When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all. *Farrar v. Hobby*, 113 S.Ct. at 575.

CONCLUSION

Although it may have been for the wrong reason, the district court rendered a correct judgment. The United States Court of Appeals for the Fifth Circuit, in full view of this Court's opinion in *Farrar*, summarily affirmed the district court's judgment. The judgment of the court of appeals is fully consistent with *Farrar*. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KENNETH W. PETERS	§	
	§	
VS.	§	
	§	CIVIL
LAKE LIVINGSTON MEDICAL	§	ACTION NO.
CENTER, RAYMOND A. NEUMAN,	§	L-88-179-CA
M.D., C.W. ("BILL") INGRAM,	§	
M.D., MICHAEL R. SHUKAN,	§	
M.D., JERRY WOOD, M.D.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT POLK COUNTY'S MOTION TO ALTER OR AMEND JUDGMENT AND PLAINTIFF'S MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Kenneth W. Peters, M.D., plaintiff herein, and files his response to Defendant Polk County's Motion to Alter or Amend Judgment and his Motion for Permanent Injunction and in support thereof would respectfully show the court as follows:

1. Plaintiff objects to Polk County's Motion to Alter or Amend Judgment because it was not timely filed. F.R.C.P. 59(e) provides that such a motion "shall be served no later than 10 days after entry of the judgment." Final judgment was filed herein on April 29, 1992. Defendant Polk County's motion was not served until May 13, 1992, and was not filed with the court until May 15, 1992. The language of this rule is mandatory and does not allow for exceptions.

2. Defendant Polk County contends that Plaintiff's victory is technical only and does not change the relationship of the parties. This contention is clearly erroneous. The actions of Polk County in both terminating Plaintiff's privileges and denying him privileges were found by the jury and the court to be in violation of both substantive and procedural due process requirements. The evidence adduced at trial showed clearly that there was no rational basis for depriving Plaintiff of privileges and that the procedures used to exclude plaintiff were patently unfair, arbitrary, and capricious. The jury's verdict and the Court's judgment confirm is (sic) consistent with this evidence and confirms (sic) that the actions taken by defendant Polk County were unlawful. Polk County's actions with respect to plaintiff are therefore void as a matter of law. The judgment does therefore fundamentally alter the relationship of the parties by declaring the actions taken by Polk County to be unlawful.

3. Plaintiff's position concerning relief has been consistent throughout this litigation. He has not demanded reinstatement nor has he demanded back pay or benefits. He has sought primarily to have the record corrected so that the hospital's unlawful action will not continue to prejudice plaintiff for the rest of his life through damage to his reputation and to his prospects for any future professional affiliations, academic recognitions, professional association recognition, and the like. Much evidence was adduced at trial concerning the adverse impact the hospital's actions will have on plaintiff's professional reputation and career opportunities for the rest of his life.

4. Plaintiff was thus content with the verdict and judgment to the extent that they confirmed that the hospital's actions in both terminating and denying his privileges were unlawful. Armed with this judicial declaration, plaintiff re-

approached Polk County to work out terms of his separation that would not be unlawful and that would not continue to prejudice him. Attached hereto is a true and correct copy of the May 5, 1992, letter sent by the undersigned to counsel for Polk County seeking to work out a mechanism for resolving plaintiff's medical staff status with the hospital in a manner consistent with the judgment. In making this request plaintiff did not seek anything from Polk county that would cause it any additional hardship or expense (apart from the separate issues of costs and attorneys fees). Plaintiff made it clear he did not seek to renew his practice of medicine at the hospital or to demand anything from the hospital that could not be easily given without cost.

5. Astonishingly, even after a final judgment had been entered declaring the actions of the hospital to be unlawful, Polk County's response to plaintiff's request was to say that it intends to stand by its prior actions concerning Dr. Peters and to do nothing to repair or remedy any legal defects. *See* Mr. Don Karotkin's May 14, 1992, letter to the undersigned, a true and correct copy of which is also attached hereto. (Also enclosed for the record and for the Court's reference is a true and correct copy of the undersigned's May 28, 1992, letter of response to Mr. Karotkin.) Plaintiff has proposed to Polk County, following the judgment, to work out a remedy whereby plaintiff would entirely sever his relationship with the hospital and the hospital would incur no expense or hardship. Polk County's refusal even to entertain plaintiff's proposal on the ground that the judgment does not expressly require the hospital to revisit the plaintiff's medical staff status makes no sense to plaintiff and appears to be in bad faith. Polk County is saying to plaintiff that it fully intends to stand the (sic) hospital's peer review actions even though a federal court has determined them to be unlawful and even though plaintiff is willing to sever fully his connection with the hospital at no

cost or burden to the hospital. This intransigent position by Polk County is consistent with the rigid stand it has historically taken in this matter that forced plaintiff to file suit in the first place and forced this matter to proceed all the way to trial.

6. In view of Defendant Polk County's conduct and stated position since judgment was entered, Plaintiff must now request this Court to amend or alter the judgment to enjoin Polk County to act in a manner consistent with the verdict and the judgment on the merits. Polk County argues that Plaintiff should not be entitled to any equitable relief because Plaintiff did not plead for such relief and did not submit a proposed instruction for the jury on the issue. Plaintiff responds that his complaint *did* request injunctive relief and that it is inappropriate to submit to the jury the equitable power and discretion of the court. Moreover, it is the actions and declarations of Polk County since the judgment was entered that make injunctive relief now appropriate. Polk County's refusal to revisit its peer review actions against plaintiff even after they have been judicially declared to be unlawful and when resolution of the matter would involve no additional expense or hardship can only be motivated by spite or malice.

7. Injunction and mandamus are proper remedies under 42 U.S.C. §1983. A district court has power to grant injunctive relief where there has been a deprivation of civil rights, and such relief may be obtained against municipal corporations or political subdivisions. *Cohen v. City of Miami*, 54 F.R.D. 274 (D.C. Fla. 1972); *O'Bryan v. Saginaw County, Mich.*, 446 F. Supp. 436 (D.C. Mich. 1977).

8. One seeking injunctive relief must usually demonstrate that he has no adequate remedy at law. Plaintiff

has already sought and obtained a judicial declaration that Defendant Polk County's peer review actions against him have been in violation of law, but Polk County has expressly refused to modify its records or its stand in any way unless told to do so by this Court. Polk County refuses to revisit the question of Plaintiff's medical staff status, and Polk County can be expected therefore to continue to tell anyone seeking a reference request that Plaintiff was terminated from the staff and/or denied reappointment for quality of care reasons. Polk County's position is essentially that plaintiff's legal remedy is insufficient to induce Polk County to modify its conduct one bit. Defendant's conduct is in bad faith and forces Plaintiff to seek injunctive relief from the court.

9. Defendant Polk County's conduct will also cause Plaintiff irreparable harm if injunction is not entered. Any hospital or clinic with which Plaintiff might seek to affiliate in the future will most certainly ask Plaintiff on its application form whether Plaintiff's medical staff privileges have ever been limited, terminated, or denied at another health care facility. So long as defendant Polk County stands by its prior actions, even following judicial declaration of the unlawfulness of same, Plaintiff must list the actions by Polk County and try his best to explain the circumstances. When the new facility contacts Polk County for a reference on Plaintiff, as it is required to do under state and federal law, Polk County will, based on its stated position, simply advise the inquiring facility that Plaintiff's privileges were terminated/denied for quality of care reasons and will not acknowledge or disclose that such actions were judicially determined to be unlawful. Evidence adduced at trial showed that plaintiff's application to be admitted as a fellow of the American College of Surgeons has already been denied because of a report of the adverse actions taken by Polk County against Defendant (sic). Failure by Polk County to remedy its unlawful actions and continuing reports to third

parties by Polk County of its adverse actions against Plaintiff will most certainly continue to frustrate plaintiff's efforts to advance himself professionally and to affiliate in the future with any other health care facilities, not to mention the continuing adverse impact such actions by Polk County will have on plaintiff's professional representation (sic). Polk County has demonstrated the likelihood, in fact the certainty, that it will continue to stand by its prior actions, and such conduct will most certainly cause plaintiff additional irreparable harm to his reputation and to his career.

10. Courts are often called upon to balance equities or to balance hardships to the parties before granting injunctive relief. Here, such a balancing clearly favors plaintiff. The injury to Plaintiff caused by Defendant's intransigence is tangible, substantial, and irreparable. Conversely, Plaintiff does not seek any remedy that would cause Polk County additional hardship or cost. Plaintiff seeks only to ensure that Polk County and its agents do not continue to represent that Plaintiff's privileges were terminated/denied for quality of care reasons when in fact those actions were defective both procedurally and substantively.

11. Plaintiff thus respectfully requests this Court to issue an order: 1) expurgating and expunging all records of defendant Polk County in connection with the wrongful termination and denial of plaintiff's medical staff privileges to, *inter alia*, allow plaintiff to restore his professional reputation as much as possible and to protect plaintiff from future prejudice in his professional pursuits (*See Chapman v. Kleindienst*, 507 F.2d 1246 (C.A. Ill. 1974) (sic); *Guerra v. Roma Independent School Dist.* 444 F.Supp 812 (S.D. Tex. 1877) (sic); *Harrah v. Levrette*, 271 S.E.2d 322 (W. Va. 1980); *Carter v. Hardy*, 526 F.2d 314 (S.D. Tex. 1976) (sic); 2) restoring the *status quo ante* by reinstating plaintiff

to the medical staff of the hospital so that plaintiff can forthwith submit his resignation from the medical staff; 3) prohibiting Polk County, its agents, any officers or members of the hospital or its medical staff, any of the defendants herein, or any of their successors in interest from reporting or advising anyone that plaintiff's privileges had been terminated or denied and from making any statements concerning plaintiff's medical staff status at the hospital other than that he resigned voluntarily to pursue his medical practice elsewhere.

12. Defendant Polk County further argues in its Motion to Alter or Amend Judgment that the causes of action on which plaintiff did not prevail were "patently frivolous and had no basis in law or fact." This contention is clearly erroneous. Most of the ancillary causes of action were eventually dropped or dismissed because plaintiff had done such a good job of mitigating his damages. There is no question that the actions of the defendants resulted in the deprivation of plaintiff's privileges and the effective loss of his opportunity to practice medicine in Livingston. These actions were found by the jury and the court to be done unfairly and to be without reasonable basis. Given the adverse references and reports of adverse action being issued out of Livingston in the Fall (sic) of 1988 and the Spring (sic) of 1989, it was entirely possible that plaintiff would not have been able to secure hospital privileges elsewhere and possible he could have lost the privileges he had at Charter Hospital in Cleveland. Had he not been able to find another hospital affiliation as a result of the wrongful conduct of defendant Polk County, plaintiff's income would likely have dropped significantly. Had that occurred, plaintiff would likely have prevailed on his ancillary causes of action. At the time suit was filed, it was impossible to know what the full extent of Plaintiff's damages would be. That plaintiff worked hard to mitigate his damages and was fortunate that

Charter Hospital in Cleveland was willing to allow him to retain privileges notwithstanding the adverse report from Polk County, and that many of plaintiff's causes of action diminished as he mitigated his damages from defendant's wrongful conduct does not make plaintiff' claims frivolous.

13. Defendant Polk County also argues that plaintiff had no competent proof that he had suffered economic injury as a result of Polk County's wrongful conduct. This contention is clearly erroneous. It is uncontroverted that plaintiff lost his Livingston practice as a result of defendant's wrongful acts. Plaintiff's economic expert gave uncontroverted testimony that the past, present, and future value of that lost practice was over $400,000 projected over a 20-year period. The jury elected to award no economic damages to plaintiff, presumably because plaintiff substantially mitigated his damages and eventually made more money at Cleveland than he had made while at Livingston. But regardless of the reasoning behind the jury's decision, uncontroverted evidence at trial demonstrated that 1) plaintiff lost his Livingston practice as a result of defendant's wrongful conduct, 2) plaintiff could have pursued medical practices in both Cleveland (sic), and 3) the lost Livingston practice had substantial economic value to plaintiff.

14. Defendant Polk County further argues that four-fifths of plaintiff's costs were incurred in prosecuting his suit against defendants other than Polk County. This contention is also erroneous. Plaintiff would have incurred the same costs even if Polk county had been the only defendant. Uncontroverted evidence at trial shows that the Polk County Commissioners did what the hospital administrator and the medical staff leadership told them to do. The only way for plaintiff to discover facts material and relevant to his adverse peer review action was to pursue discovery the way he did -

- to depose the persons most closely associated with and responsible for the actions that took place. Those persons were the individuals deposed by plaintiff.

15. Defendant Polk County further asserts in its motion that, "As was apparent from the conduct of the plaintiff at the time of trial, this suit was brought by the plaintiff against the individual doctor defendants as a vendetta..." This statement is entirely without merit. Plaintiff's conduct at trial was exemplary, and plaintiff did or said nothing to give substance to defendant's claim. The evidence at trial showed clearly that although the Polk County Commissioners Court made the final decisions concerning plaintiff's staff privileges, that body and the individuals comprising that body had no independent knowledge of Dr. Peters's (sic) situation and depended entirely on the advice and recommendations of the hospital administrator and the executive committee of the medical staff. The jury has already rendered its verdict that there was no reasonable basis for those recommendations. That the individual defendants, acting as agents of Polk County, may have been individually exonerated from §1983 liability based on a good faith defense is no reason for the court to award costs in a manner other than that prescribed by Rule 54(d).

16. Plaintiff has assumed that "costs" as used in the judgment do not include attorneys' fees, and plaintiff has addressed the issue of attorneys' fees separately from the issue of costs. In its Motion to Alter or Amend Judgment, Defendant Polk County argues, in connection with the attorneys' fees issue, that "plaintiff has not secured a decision which changes the legal relationship [between the parties] in a way that alters the defendants' behavior toward the plaintiff and that secures some of the relief sought by the plaintiff in bringing the suit..." As noted earlier herein,

plaintiff strongly disagrees and contends that the judgment of the court renders the hospital's peer review actions against Dr. Peters as fatally flawed and null and void. Defendant's refusal to acknowledge that the jury's verdict and the court's judgment *does* (sic) significantly affect the relationship of the parties is what prompts plaintiff's request herein for declaratory and injunctive relief. Plaintiff requests that the court defer further action on the attorneys' fees issue until the other pending matters are disposed of and further clarification is obtained concerning the extent to which the jury's verdict and the court's judgment should and do substantially alter the relationship of the parties.

Prayer

Wherefore, the plaintiff respectfully requests that this court confirm the jury's verdict by declaring that Defendant Polk County's actions in terminating and denying plaintiff's privileges were in violation of law and are null and void and by issuing an order of injunction 1) expurgating and expunging all records of defendant Polk County in connection with the wrongful termination and denial of plaintiff's medical staff privileges 2) restoring the *status quo ante* by reinstating plaintiff to the medical staff of the hospital so that plaintiff can forthwith submit his resignation from the medical staff; and 3) prohibiting Polk County, its agents, any officers or members of the hospital or its medical staff, any of the defendants herein, or any of their successors in interest from reporting or advising anyone that plaintiff's privileges had been terminated or denied and from making any statements concerning plaintiff's medical staff status at the hospital other than that he resigned voluntarily to pursue his medical practice elsewhere.

Dated: 5/29/92

RESPECTFULLY SUBMITTED,

James W. Rice
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SBOT No. 1682200
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Houston, Texas 77002
713-751-0133

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KENNETH W. PETERS	§	
	§	
VS.	§	
	§	CIVIL ACTION
LAKE LIVINGSTON MEDICAL	§	NO. L-88-179-CA
CENTER, RAYMOND A.	§	
NEUMAN, M.D., C.W. ("BILL")	§	
INGRAM, M.D., MICHAEL R.	§	
SHUKAN, M.D., JERRY WOOD,		§
M.D.	§	

PREVAILING PARTY'S MOTION FOR AWARD OF ATTORNEYS (SIC) FEES

COMES NOW Kenneth W. Peters, M.D., prevailing party in the above action, who files this motion for attorneys (sic) fees from defendant Polk County d/b/a Polk County Memorial Hospital pursuant to 42 U.S.C. § 1988, and in support thereof would show the court as follows:

I.

This action was brought by the plaintiff, Kenneth W. Peters, M.D., under inter alia, 42 U.S.C. § 1983 to obtain relief for the plaintiff for the injury done to his professional reputation and to his finances by the civil rights and due process violations committed by the defendants against him.

II.

Pursuant to 42 U.S.C. § 1988, this court may award reasonable attorney's fees to a prevailing party bringing suit under 42 U.S.C § 1983.

III.

On April 10, 1992, the jury in this action returned a verdict in favor of the plaintiff against defendant Polk County based on both substantive and procedural due process violations. The court entered a Memorandum Opinion and Order and Final Judgment on April 28, 1992 (filed April 29, 1992), adopting the jury's verdict and awarding plaintiff nominal damages of $1.00 for each civil rights violation by defendant Polk County.

The plaintiff was first represented by Mary Bearden, Esq., of the law firm of Wood, Lucksinger & Epstein, who was engaged by the plaintiff to represent him in his discussions with the hospital and the hospital's medical staff from on or about December 1, 1986, until on or about January 3, 1989. On or about October 30, 1988, Ms. Bearden recommended to plaintiff that he file suit against the hospital, but Ms. Bearden was simultaneously forced to withdraw as counsel, since her law firm adhered to a strict policy of not representing physicians in lawsuits against hospitals.

V.

Ms. Bearden then referred the plaintiff to Thomas R. Beech, Esq. Mr. Beech represented the plaintiff in his continuing negotiations with the hospital and eventually filed this suit on behalf of the plaintiff on or about December 19, 1988. For reasons unrelated to the plaintiff or to this

lawsuit, Mr. Beech was forced to withdraw as counsel on or about January 1, 1990. The plaintiff subsequently engaged Mr. James W. Rice on or about February 1, 1990, and Mr. Rice has represented the plaintiff in this action from that date and continues to represent the plaintiff in this action.

VI.

An affidavit summarizing the hours expended and services provided to the plaintiff by the foregoing attorneys is attached hereto and incorporated herein by reference.

VII.

The undersigned discussed with Mr. Don Karotkin, counsel for Polk County in this action, whether stipulation might be reached concerning attorneys (sic) fees under 42 U.S.C. §1988. Mr. Karokin objected to any award of attorneys (sic) fees to plaintiff in this action.

VIII.

Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Attorneys (sic) Fees is filed contemporaneously herewith.

Prayer

Wherefore, the plaintiff respectfully requests that this court award to plaintiff reasonable attorneys' fees as part of the costs taxable against the defendant Polk County in this cause of action, and that the court grant any further relief to which the plaintiff Kenneth W. Peters, M.D. is entitled.

Dated: 5/6/92

RESPECTFULLY SUBMITTED,

James W. Rice
Attorney for Petitioner
SBOT No. 1682200
1111 Fannin, Suite 1510
Houston, Texas 77002
713-751-0133

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KENNETH W. PETERS	§	
	§	
VS.	§	
	§	
LAKE LIVINGSTON MEDICAL	§	CIVIL ACTION
CENTER, RAYMOND A.	§	NO. L-88-179-CA
NEUMAN, M.D., C.W. ("BILL")	§	
INGRAM, M.D., MICHAEL R.	§	
SHUKAN, M.D., JERRY	§	
WOOD, M.D.	§	

PREVAILING PARTY'S SUPPLEMENTAL
MOTION FOR AWARD OF ATTORNEY'S FEES

COMES NOW Kenneth W. Peters, M.D., the prevailing party in the above action, who files this supplemental motion for attorney's fees from defendant Polk County d/b/a Polk County Memorial Hospital pursuant to 42 U.S.C. § 1988. In support of this motion, Kenneth W. Peters, M.D., would show the court as follows:

I.

The plaintiff incorporates herein his Prevailing Party's Motion for Award of Attorney's Fees and the Affidavit thereto as if copied verbatim.

II.

In addition to the expenses previously listed in the plaintiff's Attorney's (sic) Affidavit in Support of Award of Reasonable Attorney's Fees, the plaintiff has incurred other expenses in the amount of $6,297.25. This amount includes $6,070.25 for the services of Robert Hill, Ph.D., an expert witness who testified concerning the plaintiff's economic damages, and $227.00 for the printing and mounting of the plaintiff's courtroom exhibits. These expenses were inadvertently omitted from plaintiff's earlier submission.

Dated: May 13, 1992

RESPECTFULLY SUBMITTED,

James W. Rice
Attorney for Petitioner
SBOT No. 1682200
1111 Fannin, Suite 1510
Houston, Texas 77002
713-751-0133

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

KENNETH W. PETERS, M.D.	§	
	§	
V.	§	CIVIL ACTION
	§	NO. 9:88CV179
LAKE LIVINGSTON MEDICAL CENTER, ET AL	§	
	§	

ORDER

Four Motions are pending before the Court:

(1) Plaintiff's motion for attorney fees (docket #172),

(2) Motion of Defendant's (sic) Bill Ingram, M.D., Raymond Neuman, M.D. and Michael Shukan, M.D. to alter or amend judgment (docket #176),

(3) Motion of Defendant Polk County to alter or amend judgment (docket #175), and

(4) Plaintiff's motion for declaratory and injunctive relief (docket #181).

Having carefully considered the motions of the parties, the Court finds that Plaintiff's motion for attorneys' fees should be **DENIED**. In light of *Estate of Farrar v.*

Cain, 941 F.2d 1311 (5th Cir. 1991), *cert. granted, sub. nom., Farrar v. Hobby*, 112 S.Ct. 1159 (1992), I find that Plaintiff is not a prevailing party.

The Court further finds that the motion of Defendants Neuman, Ingram and Shukan to alter or amend judgment should be **GRANTED in part and DENIED in part**. The motion is **GRANTED** to the extent that the final judgment filed on April 29, 1992, shall be amended to provide that both the individual Defendants and Plaintiff shall each bear their own costs. The motion is **Denied** as to Defendants' request that the judgment be altered, amended, or modified to award attorneys' fees to the Defendants. In light of *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990), I find the Defendants named above are precluded from an award of attorneys' fees by the Court's finding herewith that Plaintiff's action was not frivolous, unreasonable, or without foundation.

The Court further finds that the motion of Defendant Polk County to alter or amend judgment should be **Denied**. Federal Rule of Civil Procedure 54(d).

Furthermore, the Court finds that Plaintiff's motion for injunctive and declaratory relief should be **Denied**. Plaintiff lacks standing for injunctive in that the complained of injuries are conjectural rather than real and immediate. *See Henschen v. City of Houston, Texas*, 959 F.2d 584, (5th Cir. 1992). It is therefore

ORDERED that the motion of Defendants Neuman, Ingram and Shukan to alter or amend final judgment be **GRANTED** in part and amended judgment providing that the individual Defendants and Plaintiff shall bear their own costs shall be entered. This motion is **Denied** as to Defendants' request for an award of attorneys' fees against Plaintiff. It is further

ORDERED that Defendant Polk County's motion to alter or amend judgment is **DENIED**. Finally, it is

ORDERED that Plaintiff's motion for injunctive and declaratory relief be **DENIED**.

SIGNED this 30th day of July, 1992.

_____

Judith K. Guthrie
United States Magistrate Judge

APPENDIX E

TEXAS STATE BOARD OF MEDICAL EXAMINERS
1101 CAMINO LA COSTA, SUITE 201 (512)452-1078
P.O. BOX 13582, CAPITOL STATION
AUSTIN, TEXAS 78711

August 29, 1989

KENNETH WALKER PETERS, MD
210 E HOUSTON STREET
CLEVELAND, TX 77327

Re: File # 89-1746
Please refer to this file.

Dear Doctor PETERS:

I wish to inform you that we have received a report that medical peer review action was taken against you. The report was filed by:

POLK COUNTY MEMORIAL HOSPITAL WITH REGARDS (sic) TO THE DENIAL OF REAPPOINTMENT.

The Board is statutorily obligated to investigate peer disciplinary action and to determine whether a violation of the Medical Practice Act occurred. The Board's investigation is an independent evaluation of the circumstances which are the basis of the peer review action taken.

You are encouraged to share with us all of the information that would assist the Board is fulfilling its

obligations. The information you submit becomes a part of the investigational file and is confidential. The information is used for Board deliberations and potential disciplinary action by the Board.

Please complete and return the enclosed questionnaire to the Board within three weeks.

If you have any questions regarding this investigation, please mail them to me at the above address.

Sincerely,

LLOYD E. MCRAE
INVESTIGATIONS DIVISION

LM/tc
Enclosure: Questionnaire